

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM**

In the Matter of the Application of

MICHAEL A. BARILE and TOMMY A. BONIELLO,

Petitioners,

-against-

PUTNAM COUNTY DEPARTMENT OF HEALTH, Index No.
TOWN OF CARMEL, and NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents,

For an Order pursuant to New York Civ. Prac. L. & R.
Article 7803(1).

**MEMORANDUM OF LAW
IN SUPPORT OF VERIFIED PETITION**

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October 29, 2019

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EXPLANATION OF CITATION FORMS

The following citation forms are used in this memorandum:

- “Code” for reference to the Code of the Town of Carmel, as amended.
- “CPLR” for reference to New York Civ. Prac. L. & R.
- “Ex. []” for reference to the exhibits to the Petition.
- “Petition” for reference to the accompanying Verified Petition, sworn to on October 22, 2019.
- “Premises” for reference to real property known as 825 South Lake Boulevard, Mahopac, New York 10541, which is identified on the tax map of the Town of Carmel as 75.43-1-22.
- “Sewer District 1” for reference to Town of Carmel Sewer District Number One.
- “Watershed Regulations” for reference to the Rules and Regulations for the Protection From Contamination, Degradation, and Protection of the New York City Water Supply and its Sources, which became effective on May 1, 1997, and as amended as of April 4, 2010, et al.

The Parties:

- “NYCDEP” for reference to respondent New York City Department of Environmental Protection
- “PCDOH” for reference to respondent Putnam County Department of Health
- “Petitioners” for collective reference to petitioners Michael Barile and Tommy A. Boniello.
- “Town” for reference to respondent Town of Carmel

Petitioners submit this memorandum of law in support of its accompanying verified petition seeking mandamus relief pursuant to CPLR § 7803(1).

PRELIMINARY STATEMENT

This special proceeding in mandamus seeks to compel Respondents to perform their non-discretionary, ministerial acts of reviewing and deciding Petitioners' application to connect its sewerage equipment on the Premises to Sewer District 1. Petitioners' sewerage equipment was installed and tested on the Premises and then granted conditional approval by PCDOH in 1993. (Ex. __, Petition). Petitioners installed this equipment at that time to the Premises would be served by another means of wastewater and sewage disposal should the existing subsurface sewage treatment system on the Premises (the "SSTS") fail or become outmoded or insufficient in the future. (Petition, ¶¶ __).

The Town's recent efforts to enforce a purported violation of its Sewer Use Law against Petitioners for connecting their sewerage equipment to Sewer District 1 is without basis in law. Similarly, PCDOH is without legal authority to regulate and enforce violations of the Putnam County Sanitary Code as they relate to Petitioners' sewerage equipment, which is not within its delegated authority under the Watershed Regulations. Finally, NYCDEP has been in receipt of Petitioners' application and engineering data in support of connecting to Sewer District 1. Application materials with sufficient detail were supplied months ago, and must not only be decided but granted by NYCDEP to the extent it has any review authority whatsoever.

Respondents must communicate and engage in inter-agency coordination to review and decide Petitioners' application without delay. Absent this ministerial relief, Petitioners cannot make any reasonable use of the Premises and pending violations and enforcement actions by the Town and PCDOH will continue without a lawful basis. Respondents' unexplained non-

responsiveness has become crippling to Petitioners and continues to deprive them of the use of sewerage equipment installed, tested, and approved for use on the Premises dating back more than twenty-five years.

Respondents have failed to act upon Petitioners' applications despite numerous requests to do so and inspections, which directly contravenes their duties. Respondents are not vested with discretion to abstain from discharging these duties, which is a purely ministerial function by nature.

STATEMENT OF THE FACTS

Petitioner respectfully refers the Court to the Petition and accompanying exhibits for a full and complete exposition of the relevant facts.

ARGUMENT

POINT I

MANDAMUS LIES TO COMPEL RESPONDENTS TO DISCHARGE THEIR NON-DISCRETIONARY, MINISTERIAL DUTIES

Mandamus to compel is a judicial command directing a public body or officer to perform an act they are obligated by law to perform. *See Matter of Hamptons Hosp. & Med. Ctr. v. Moore*, 52 N.Y.2d 88, 99 (1980). Success in a proceeding in the nature of mandamus requires a showing of "a clear legal right" to the relief sought. *Assoc. of Surrogates and Supreme Court Reporters within the City of New York et al. v. Richard J. Bartlett, as State Administrator of the Admin. Bd. of the Judicial Conference of the State of N.Y.*, 40 N.Y.2d 571, 574 (1976), citing, *Matter of Pruzan v Valentine*, 282 N.Y. 498 (1940).

The distinction between ministerial and judicial acts is that where the law prescribes the rule to be followed so as to leave nothing to the exercise of judgment or discretion, the act is a ministerial act. *Matter of Gross v. Albany Co. Bd. of Elections*, 3 N.Y.3d 251, 263, 785 N.Y.S.2d

729 (2004), citing, *Wickel v. Cohen*, 262 N.Y. 446, 187 N.E. 634 (1944). By contrast, “where the act involves the exercise of judgment or discretion in determining whether the duty exists, the act is judicial in character. *Id.* As developed below, reviewing and deciding Petitioners’ application to connect to Sewer District 1 leaves nothing to the exercise of respondents’ judgment. It is binary; either the application is complete and may be decided, or it is not. It is that simple.

Ministerial acts, which do not involve the exercise of judgment or discretion, are within the ambit mandamus to compel. See *Matter of Gimprich v Board of Educ. of City of N.Y.*, 306 N.Y. 401, 406 (1954). Where an officer or agency failed or refused to conduct a hearing or decide a particular matter where there was a mandatory, non-discretionary duty to do so, mandamus is appropriate to compel performance of the required duty. *Matter of Davidson v. LaGrange Fire District*, 82 A.D.3d 1227, 1229 (2d Dep’t 2011). Such is the case here.

A. NYCDEP

NYCDEP has not rejected the application or submissions by Petitioners’ engineer on June 27, 2019. (Ex. F, Petition). To the contrary, NYCDEP, through Matthew Burd, responded to Petitioners’ application by stating: “I can issue such an approval.” (Ex. E at 1, Petition). Although NYCDEP then directed further administrative action by the Town in furtherance of this application, Mr. Burd responded to Petitioners that upon receipt of the Town’s administrative request for information on the Premises, “I should be able to respond quickly.” (Ex. E at 1, Petition).

NYCDEP’s actions reflect its receipt, review, and acceptance of Petitioners’ application to connect to Sewer District 1. Since Petitioners supplied the application and supporting

engineering information back in June, 2019, NYCDEP that's certainly not objected to the information or its completeness in the four ensuing months.

Section 18-23(d)(6)(i) of the Watershed Regulations provides:

"If the Department fails to notify the applicant of its decision within ten (10) business days of the receipt of such notice, *the application shall be deemed approved subject to the standard terms and conditions applicable to such an approval.* (emphasis supplied).

Far more than ten business days have elapsed since Petitioners filed their application and supporting engineering analysis for its sewerage equipment with NYCDEP. (Ex. F, Petition). As such, NYCDEP is left with no discretion other than to deem Petitioners' connection application as complete and approved.

Notwithstanding the above, Petitioners' sewerage equipment on the Premises, having been installed and tested in 1993, predates the Watershed Regulations themselves, which were promulgated in 1997. As set forth more fully in Paragraphs 61-65 of the Petition, the sewerage equipment at issue is not a "new" sewer connection, which falls outside the scope of those regulated activities that would otherwise require a permit pursuant to Section 18-16(a)(72) of Watershed Regulations and Section 18-23(d)(1) and (2) entitled "Review and Approval Procedures. Thus, even assuming *arguendo* that NYCDEP has the authority to review and decide Petitioners' application, Petitioners' equipment predates these regulatory mandates and permit requirements.

B. The Town

The Town's notice of violation, dated October 24, 2019, is without basis in the Code and is otherwise legally insufficient. (Ex. J, Petition). While the discretion to enforce the Town's Sewer Use Law (codified in Article III of the Code, Chapter 120) may confer broad discretion on

the Town for prosecuting violations, the Town's October 24, 2019 purported violation letter to Petitioners (the "NOV").

Code § 120-17 entitled "Basis of sewer use law" provides that:

"All requirements, directives, and orders calling for mandatory use of the sewers within the service area of the POTW for the proper discharge of sewage and other wastes, including industrial wastes, shall be established and given by the Town Board or NYSDEC and, in the case of discharges to the Mahopac Wastewater Treatment plant, the NYCDEP."

The Code clearly delegates certain regulatory authority to NYCDEP for facilities that it owns including the Mahopac Wastewater Treatment plant, which receives waste from Sewer District 1. In doing so, the Code takes away from the Town any discretionary functions relating to out-of-district sewer connections that the Town could conceivably decide. These decisions fall within the exclusive purview of NYCDEP. There is no alternative construction.

The NOV's findings section cites, among other things, that Petitioners allegedly did not obtain all conditional approvals as required by the 1993 Approval; specifically, Paragraph 8 conditioning 1993 Approval "*upon receipt of all necessary approvals from other agencies, including NYCDEP.*" (emphasis in original); (Ex. J at 3-4, Petition). Then, the NOV orders petitioner's to comply with NYCDEP insofar as it requires submissions and communication the process a request for an out of district sewer connection. (Ex. J at 5, Petition). The NOV is based on false premises.

First, the NOV completely overlooks that Petitioners' installed and tested sewerage equipment predates, and is thus exempt from, the later-adopted requirement in the Watershed Regulations regulating "new" sewer connections discussed in Point I.A, above. As such, this fundamental element of the NOV is incorrect. Secondly, the NOV ignores that NYCDEP has already accepted Petitioners' application materials and submissions from its engineer, and

indicated its willingness to approve the out of district connection application through Matthew Burd. Again, this point was developed more fully in Point I.A, above. As such, the NOV is critically deficient and of no legal import. This is critical to petitioner's application for relief in mandamus because it presumably underlies the Town's basis for suspending its review of Petitioners' application for sanitary sewer connection permit, which was received and filed by the town on June 4, 2019. (Ex. D, Petition).

Based on the above, the town neither had nor has any legal authority to suspend indefinitely this application. It has a nondiscretionary and ministerial duty to mark the application is received and complete and accept the payment of outstanding capital taxes that Petitioners proffered in June, 2019. (Petition, ¶¶ 33-36).

C. PCDOH

PCDOH, through its Policies for Sewage System Repair Permits Bulletin (RP-1) promulgated in July, 2007, assumed responsibility for administering NYCDEP's Watershed Regulations as they pertain to subsurface sewage treatment systems; specifically, Section 18-38 of the Watershed Regulations entitled "Subsurface Sewage Treatment Systems." NYCDEP delegated the administration of Section 18-38 of the Watershed Regulations to PCDOH with respect to reviewing and approving new, altered, modified, and remediated SSTS authority to inspect and enforce subsurface sewage treatment systems including the SSTS to PCDOH.

Accordingly, PCDOH has no review authority whatsoever as it relates to sewer connections or sewer equipment as its sole province is to regulate and enforce standards relating to subsurface sewer treatment systems. As such, PCDOH has no discretionary or administrative review authority with respect to Petitioners' application to NYCDEP and the Town for an out of district connection to Sewer District 1. Even assuming, *arguendo*, that PCDOH has any such

review authority, it can only be administrative and ministerial in nature as it has no substantive review authority or joint review authority with either NYCDEP or the Town.

Under these circumstances, Respondents must now be compelled to review and decide Petitioners' application to NYCDEP and the Town for an out of district connection to Sewer District 1 without any further delay. Thus, mandamus lies to compel Respondents to perform these non-discretionary, ministerial duties.

CONCLUSION

Petitioners respectfully request the Court enter an Order pursuant to CPLR § 7803(1) for the relief set forth in the accompanying verified petition, and for such other and further relief as to this Court seems just, proper, and equitable.

Dated: Brewster, New York
October 29, 2019

Respectfully submitted,

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